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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

BISNO DEVELOPMENT ENTERPRISE, LLC, Plaintiff and Appellant, v. VDC AT THE MET, LLC, Defendant and Respondent.	B286739 (Los Angeles County Super. Ct. No. BC545320)

APPEAL from an order of the Superior Court of Los Angeles County, Daniel S. Murphy, Judge. Affirmed.

Law Offices of Andrew D. Weiss and Andrew D. Weiss, for Plaintiff and Appellant.

Raines Feldman, Miles J. Feldman, Robert M. Shore, Laith D. Mosely, for Defendant and Respondent.

INTRODUCTION

Plaintiff and appellant Bisno Development Enterprise, LLC (Plaintiff) appeals from a judgment in favor of defendant and respondent VDC at the Met, LLC (Defendant), entered after the court sustained without leave to amend Defendant's demurrer to Plaintiff's claim for negligent interference with prospective economic advantage (negligent interference), the sole cause of action asserted in Plaintiff's first amended complaint (complaint). Based on our conclusion that there was no special relationship between Defendant and Plaintiff giving rise to a duty of care, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Overview of relevant participants

Defendant is a California Limited Liability Company, consisting of two members: Vineyards Development, Inc. (Vineyards) and Ilus Investors, LP (Ilus). Neither Vineyards nor Ilus are parties to this appeal. Defendant was formed as a vehicle to purchase and develop real property in Santa Ana, California. Ryan Ogulnick is the principal of Vineyards, and Robert Bisno is the principal of Plaintiff. Ogulnick and Bisno are also not parties.

First Amended Complaint[1]

We summarize the allegations of Plaintiff's sole cause of action (negligent interference) in the first amended complaint, and any relevant information subject to judicial notice. (*Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75, 81 (*Siliga*), disapproved on another ground in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919 ["We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded and matters of which judicial notice has been taken"].)

Bisno and Ogulnick met in late 2010, at which time Vineyards had an option to purchase a parcel of real property (the Property) in Santa Ana. If Vineyards could

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[1] The original complaint, which included additional defendants and causes of action, was the subject of a prior appeal, *Bisno Development Enterprise, LLC v. Vineyards Development, Inc.* (Dec. 22, 2016, B265478 [nonpub. opn.]) (*Bisno I*). In *Bisno I*, we affirmed the grant of summary judgment brought by other defendants against Plaintiff, but did not reach the merits of causes of action asserted against Defendant. We also took judicial notice of a prior federal court case brought by Plaintiff against Vineyard's co-members, owners, and/or investors in Defendant; the federal district court granted summary judgment against Plaintiff in that action as well. (*Bisno I*, at p. 4.)

obtain a change in entitlements,[2] the Property's value could substantially increase. Vineyards partnered with Ilus to form Defendant, purchase the Property through Defendant, change the entitlements, and either sell the Property or develop the Property and sell the completed development (the Project).

Under an oral contract between Plaintiff and Vineyards, as well as the principals of those two companies, Vineyards agreed to pay Plaintiff $750.00 per hour, up to a maximum of $26,000 per month, for services to change the entitlements for the Property. Plaintiff "also expected it would receive a success fee or profits interest based on the success of the Project" and would work on future projects with Ogulnick and other entities owned by Ogulnick. The oral agreement was "an economic relationship that probably would have resulted in a future economic benefit" to Plaintiff, with the future economic benefit including not just the hourly payments, but a profits interest that Plaintiff expected it would receive, "based on the success of the Project and future real estate ventures, about which Ogulnick and Bisno spoke frequently."

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[2] As we explained in *Bisno I*, "'Entitlements' are discretionary approvals by government authorities with jurisdiction over the property required for development of the property, including, for example, zoning changes, variances for open space and parking requirements, and plan review." (*Bisno I*, p. 3, fn. 1.)

In March 2011, Vineyards and others formed Defendant to purchase and develop the Property. Defendant knew about and acknowledged the existence of Plaintiff's relationship with Vineyards and its prospective economic advantage. After Defendant acquired the Property, Defendant and Plaintiff entered a contract known as the Independent Contractor Agreement (ICA) whereby Defendant agreed to pay Plaintiff $8,000 per month for entitlement services. The ICA included language acknowledging that Plaintiff "is receiving or will receive, additional compensation from others for related tasks." The ICA referenced and included as an attachment a draft written agreement between Plaintiff and Vineyards which provided for Plaintiff to receive a profits interest from Vineyards. The draft agreement is referred to as the Entitlements Retention Agreement (ERA).[3] However, earlier decisions in this case have dismissed Plaintiff's efforts to enforce the ERA or any similar agreement against Vineyards or Ogulnick. (*Bisno I*, pp. 4, 11–12, fn. 9 [noting that Plaintiff waived any challenge to the trial court's determination that collateral estoppel arising from the federal court action precluded Plaintiff's claims for breach of contract, conversion, and constructive trust].) Defendant knew about and acknowledged the existence of Plaintiff's

[3] The ERA was attached to, and incorporated in the original complaint in this case. The ERA expressly states, "This agreement is not binding on VDC At The Met, LLC ('VDC'). VDC is not a party to this Agreement."

relationship with Vineyards and its prospective economic advantage. In 2011 and 2012, Plaintiff began working with Ogulnick on two other real estate projects, called the Dyer Project and the Jeannette Lane Project.

Defendant operated in accordance with a Second Amended and Restated Operating Agreement (the Operating Agreement) between Vineyards and Ilus.[4] Section 6 of the Operating Agreement addressed management and control of Defendant among its two constituent members. The Operating Agreement defined an Outside Date and set forth a mechanism by which Vineyards could extend the Outside Date. If Vineyards met certain goals before the Outside Date, it would receive 83% and 70% of Distributable Cash, as defined in the Operating Agreement, from two portions of the Project. If Vineyards did not meet the goals before the Outside Date, it would still have its 10% membership interest in Defendant, with Ilus retaining the remaining 90%.

Vineyards sought to exercise its option to extend the Outside Date from March 28, 2012 to June 29, 2012, and Defendant[5] "wrongfully rejected [Vineyards's] exercise of its

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[4] The Second Amended and Restated Operating Agreement is attached as an exhibit to the First Amended Complaint.

[5] The complaint includes references to multiple "defendants" in a number of places, including this allegation, but Defendant is the only defendant identified and appearing.

option." Because of disagreements between its constituent members (Vineyards and Ilus), Defendant also failed to perform as required by other provisions of the Operating Agreement.

Defendant's refusal to extend the Outside Date triggered a reduction of Vineyards's entitlement to Distributable Cash from 83% and 70% to only 10%. Defendant's failure to perform other provisions of the Operating Agreement "further damaged [Vineyards] and Plaintiff." "In violating the [Operating Agreement], Defendant[] failed to act with reasonable care" and knew or should have known that such a failure would disrupt the economic relationship between Plaintiff and Vineyards, because Defendant's "actions materially reduced the compensation [Vineyards] would receive from the Project."

Plaintiff's relationship with Vineyards and Ogulnick was disrupted. The Project was ultimately successful and created a substantial profit for Defendant. Vineyards and Ogulnick refused to pay Plaintiff any profits interest from the Project. Vineyards also terminated Plaintiff's involvement in the Dyer Project and the Jeanette Lane Project, both of which resulted in a gross profit. Defendant's wrongful conduct deprived Plaintiff of future economic benefits of no less than five million dollars.

Defendant's demurrer

After Plaintiff filed the operative complaint, Defendant filed a demurrer and a request for judicial notice. The court granted the request for judicial notice and sustained the demurrer without leave to amend. The court entered a judgment of dismissal, and Plaintiff appealed.

DISCUSSION

Standard of review

"A demurrer tests the legal sufficiency of the factual allegations in a complaint. We independently review the sustaining of a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense. [Citation.] We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded and matters of which judicial notice has been taken. [Citation.] We construe the pleading in a reasonable manner and read the allegations in context. [Citation.] We must affirm the judgment if the sustaining of a general demurrer was proper on any of the grounds stated in the demurrer, regardless of the trial court's stated reasons. [Citation.]" (*Siliga*, *supra*, 219 Cal.App.4th at p. 81.)

Negligent interference with prospective economic advantage[6]

In order to state a claim for negligent interference with prospective economic advantage, a plaintiff must allege facts demonstrating that the defendant owes a duty of care to the plaintiff based on the relationship between the two. (*J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 803 (*J'Aire*); *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 348–349 ["a plaintiff who is not a party to a contract between a defendant and a third party generally may not recover for loss of expected economic advantage resulting from the defendant's negligent performance of the contract unless there is a special relationship between the parties"]; *Stolz v. Wong Communications Limited Partnership* (1994) 25 Cal.App.4th

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[6] The parties' initial briefing focused exclusively on cases involving claims of *intentional* interference with prospective economic advantage, rather than *negligent* interference. On November 8, 2018, we invited the parties to submit letter briefs addressing whether the complaint allegations were sufficient to establish a special relationship giving rise to a duty of care in the context of a negligent interference claim. (Gov. Code, § 68081 [before deciding an appeal "based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing"].) The parties responded with letter briefs analyzing the relevant case law, and the analysis in this opinion has taken the parties' additional briefing into account.

1811, 1825 (*Stolz*) ["tort of *negligent* interference with economic relationship arises only when the defendant owes the plaintiff a duty of care"].) "Whether a duty exists is a question of law to be determined by the courts." (*Lake Almanor Associates L.P. v. Huffman-Broadway Group, Inc.* (2009) 178 Cal.App.4th 1194, 1205 (*Lake Almanor*).)

Once it is established that defendant owes plaintiff a duty of care, the elements of a claim for negligent interference with prospective economic advantage are similar to those for intentional interference with prospective economic advantage, with the key difference relating to defendant's intent. (See *Crown Imports, LLC v. Superior Court* (2014) 223 Cal.App.4th 1395, 1404, fn. 10.) The elements for a negligent interference claim are "(1) the existence of an economic relationship between the plaintiff and a third party containing the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) the defendant's knowledge (actual or construed) that the relationship would be disrupted if the defendant failed to act with reasonable care; (4) the defendant's failure to act with reasonable care; (5) actual disruption of the relationship; (6) and economic harm proximately caused by the defendant's negligence. [Citations.]" (*Redfearn v. Trader Joe's Co.* (2018) 20 Cal.App.5th 989, 1005.)[7]

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[7] The *Redfearn* court reversed a lower court order sustaining defendant's demurrer to claims of intentional and negligent interference with prospective economic advantage.

Duty of care

"'The threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion. [Citations.] Whether this essential prerequisite to a negligence cause of action has been satisfied in a particular case is a question of law to be resolved by the court.' [Citations.]" (*Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1012.) "Recognition of a duty to manage business affairs so as to prevent purely economic loss to third parties in their financial transactions is the exception, not the rule, in negligence law." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 58.) Courts rarely find a duty to prevent economic harm to third parties because "[a]s a matter of economic and social policy, third parties should be encouraged to rely on their own prudence, diligence and contracting power, as well as other informational tools." (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 403 (*Bily*).)

"A duty of care may arise through statute, contract, the general character of the activity, or the relationship between the parties. [Citation.]" (*Ratcliff Architects v. Vanir*

(*Redfearn v. Trader Joe's Co.*, *supra*, 20 Cal.App.5th at p. 993.) The opinion does not discuss whether defendant owed plaintiff a duty of care, so it does not offer any helpful guidance in our case.

Construction Management, Inc. (2001) 88 Cal.App.4th 595, 604–605.) In the absence of a duty created by statute or contract, courts must consider whether the nature of the activity or the relationship of the parties gives rise to a duty. (*J'Aire*, *supra*, 24 Cal.3d at p. 803 ["[w]here a special relationship exists between the parties, a plaintiff may recover for loss of expected economic advantage through the negligent performance of a contract although the parties were not in contractual privity"]; *Lake Almanor, supra,* 178 Cal.App.4th at pp. 1205–1206 [concluding that on balance, the relevant factors weigh against finding a consultant owes a duty of care to a developer concerning timely completion of an EIR].) Plaintiff does not argue that Defendant owed it a duty based on statute or privity of contract,[8] so the question

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[8] We recognize that Defendant and Plaintiff are both parties to the ICA, but Defendant's duties under the ICA do not give rise to the duty of care necessary for a negligent interference claim. In contrast, in *North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, at pages 786 through 787 (*North American Chemical*), the court permitted a negligent interference claim against a defendant who had contracted to provide services to plaintiff, and then failed to exercise reasonable care under the contract. The contract required defendant to package and transport chemicals to plaintiff's customers. The chemicals were contaminated during packaging, and plaintiff suffered economic damages. (*Id.* at pp. 770–772.) Here, Plaintiff does not allege any breach of the ICA, and so its negligent interference claim does not rest on privity of contract.

is whether a special relationship between Defendant and Plaintiff warrants imposing a duty of care on Defendant.

In *J'Aire*, the California Supreme Court explained that when a party in Plaintiff's position seeks to recover for injury to prospective economic advantage without personal injury or property damage, courts resolve the duty issue by applying the criteria set forth in *Biakanja v. Irving* (1958) 49 Cal.2d 647, at page 650 (*Biankanja*). (*J'Aire, supra*, 24 Cal.3d at p. 804.) In *Biakanja*, a notary public's negligent failure to properly attest a will deprived the intended beneficiary of the bulk of the decedent's estate. Although there was no privity between the intended beneficiary and the notary, the Supreme Court recognized the economic damage to the plaintiff was foreseeable and concluded the notary owed the beneficiary a duty of care. (*Biakanja, supra*, at p. 651.) "Ultimately, duty is a question of public policy, generally determined by balancing the factors set forth in *Biakanja*[, *supra*, at p.] 650 . . . which include: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury suffered; (5) the moral blame attached to the defendant's conduct; and (6) the policy of preventing future harm. [Citation.]" (*Lake Almanor, supra*, 178 Cal.App.4th at p. 1205.)

The complaint allegations do not support finding a duty of care

We accept as true the allegations in Plaintiff's complaint that Defendant refused Vineyards' efforts to extend the Outside Date in Defendant's Operating Agreement with Vineyards, and that such a refusal was a violation of the Operating Agreement.[9] Applying the reasoning of *Biankanja* and *J'Aire* to the allegations in Plaintiff's complaint, we conclude that Defendant did not owe Plaintiff a duty of care. "*Biakanja* guides us in cases involving contracts between a defendant and a person other than the plaintiff. . . . [T]he absence of privity presents no hurdle." (*Lichtman v. Siemens Industry Inc.* (2017) 16 Cal.App.5th 914, 924–926 [analyzing a negligence claim by a party injured in a traffic accident against a vendor hired by the city to maintain traffic light battery backup systems].) We discuss and apply the six *Biankanja* factors below.

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[9] Defendant's initial briefing questioned whether Defendant made such a refusal. Defendant argued that Ilus, not Defendant, refused to extend the Outside Date, and that the refusal was not wrongful. Because we conclude Defendant does not owe Plaintiff a duty of care, we need not consider Defendant's arguments about wrongful conduct.

(1) Extent to which transaction was intended to affect Plaintiff

Plaintiff contends the Operating Agreement was "[i]ntended, in [p]art, to [b]enefit [Plaintiff]." Plaintiff cites to no language in the Operating Agreement or the complaint to support its contention. Instead, Plaintiff argues the larger Vineyards' share of Defendant's distributions relative to Ilus, the more likely Vineyards would have been to share profits with Plaintiff. The Operating Agreement itself supports a different conclusion: its primary purpose was to govern Defendant's operations, laying out the respective rights and responsibilities of its two constituent members, Vineyards and Ilus. The Operating Agreement includes detailed provisions outlining each member's responsibilities for contributing capital, pursuing the project, managing Defendant, and distributing profits and losses between them. None of the extensive provisions regarding Defendant's operations concern Plaintiff or other third parties.

Because the Operating Agreement alone cannot support an interpretation that it was intended to benefit Plaintiff, it argues that the Operating Agreement was one part of a "package deal" to develop the Property and for all participants to profit from that development. Plaintiff asserts that the Operating Agreement, the ICA, and the unsigned ERA between Vineyards and Plaintiff were all part of this overall package deal. Plaintiff's argument is unconvincing, because the documents themselves show that

there was no intention to enter into a "package deal" to benefit Plaintiff. The ICA stands separate and apart from the Operating Agreement as a fully enforceable contract between Plaintiff and Defendant, including identifying what Defendant will pay Plaintiff for its work seeking entitlements. The complaint alleges that the ICA obliged Defendant to pay $8,000 per month for entitlement services and does not allege any breach of the ICA, undermining the contention that Defendant took on some additional duty to ensure Plaintiff received compensation for these same services. The unsigned ERA has already been determined to be unenforceable against Vineyards. Most importantly, the ERA by its terms is expressly unenforceable against Defendant.

The facts here are distinguishable from cases where courts have held that failure to exercise reasonable care under a contract could support finding a duty of care, in part because a primary purpose of the contracts in those cases were to benefit the plaintiffs. In *J'Aire*, plaintiff was a restaurant leasing space from the county. The county hired defendant, a contractor, to make improvements and work on the heating and air conditioning systems. The contractor did not complete work in a reasonable time, which meant the restaurant could not operate for part of the time, and lacked heating and air conditioning for a longer period, leading to a loss of business and profits. (*J'Aire, supra*, 24 Cal.3d at p. 802.) The court found the contractor owed the restaurant a duty of care based in part on the first *Biankanja* criterion:

the contractor's performance under the contract was intended to affect the restaurant, because the restaurant needed the space to operate, and its lease included heating and air conditioning. (*Ibid.*) In *North American Chemical,* the defendant packing company's negligence led to contamination of plaintiff supplier's chemical products, and the court found a valid tort cause of action for negligent interference, based on the packing company's duty to exercise reasonable care in carrying out its duties under its contract with the supplier. (*North American Chemical*, *supra*, 59 Cal.App.4th at pp. 786–787.) The contract was intended to benefit the supplier, because the purpose of the contract was to facilitate the supplier's sale of chemicals to its customers. (*Id.* at p. 787.)

Plaintiff's role in the transaction here is more comparable to that of the plaintiff in *Lake Almanor*. In *Lake Almanor*, the plaintiff was a developer seeking county approval for a mixed-use development. The county hired the defendant as a consultant to prepare an environmental impact report (EIR). The contract between the consultant and the county stated the EIR was for the developer's proposed project and required the consultant to provide a copy of the EIR to the developer. The consultant also knew that the developer was reimbursing the county for the consultant's work on the EIR. (*Lake Almanor*, *supra*, 178 Cal.App.4th at pp. 1197–1198.) The consultant submitted the EIR late and the county ultimately rejected it as unacceptable. The developer sued, alleging that the

consultant's delay and inadequate work on the EIR caused it to lose a prospective sale of the subject property, resulting in economic losses. (*Id.* at p. 1198.) Applying the *Biankanja* factors, the reviewing court found that consultant did not owe any duty to the developer. The purpose of the contract for preparation of the EIR was statutory compliance; it was not intended for the developer's benefit. (*Id.* at pp. 1205–1206.)

2) Foreseeability of harm to Plaintiff

Plaintiff contends that it was foreseeable to Defendant that Plaintiff would be harmed by the alleged wrongful refusal to extend the Outside Date. Vineyards' share of profits from the Project declined by 60 to 70 percent, directly impacting Vineyards' desire and ability to pay a success fee to Plaintiff. Even accepting the foreseeability of harm, we give little weight to this consideration in determining the existence of a duty. (*Lake Almanor, supra*, 178 Cal.App.4th at p. 1206.) While foreseeability may set tolerable limitations on liability for physical harm, it is not adequate in setting limits on a party's right to recover for economic harm. (See *ibid.* [citing *Bily, supra*, 3 Cal.4th at pp. 398–399 and *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, disapproved on other grounds in *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123, fn. 10].) The need to place limits on recovery for economic harm is particularly important here,

because Plaintiff's theory is that the foreseeable economic harm is rooted in its own expectation of receiving a share of profits from Vineyards based on Vineyards' own discretion. Here, Plaintiff unsuccessfully attempted to obtain through contract the profit sharing rights it now seeks through a tort remedy, but failed. Imposing a duty on Defendant under these circumstances runs counter to the "economic and social policy" that encourages parties "to rely on their own prudence, diligence and contracting power" to protect their economic interests. (*Bily*, *supra*, at p. 403.)

(3) The degree of certainty that Plaintiff suffered injury

The risks inherent in real estate development generally and the lack of any consistent track record of profit sharing payments from Vineyards (or Ogulnick individually) to Plaintiff (or Bisno individually) dramatically reduce any measure of certainty attributable to Plaintiff's expectation it would receive a share of profits from the Project. The complaint alleges the Defendant's actions "materially reduced the compensation [Vineyards] would receive from the Project," but there are no allegations to establish any certainty that Vineyards would have shared that additional compensation with Plaintiff. Given that Plaintiff's expectation of compensation was entirely dependent upon the discretion of Vineyards and Ogulnick, the degree of certainty of injury here is unclear.

(4) Closeness of the connection between Defendant's conduct and the injury suffered

Even if we were to presume that Plaintiff's losses were certain—which we do not—we find no basis for finding any such losses were closely connected to Defendant's allegedly negligent conduct. Plaintiff argues that Defendant's refusal to extend the Outside Date led to Vineyards losing a significant percentage of Distributable Cash. The complaint alleges the Project was sold at a price significantly higher than the original purchase price for the Property, but does not allege any information about what portion of that increased value would have been considered Distributable Cash. The allegations also do not address the fact that under the Operating Agreement, Vineyards still retained a 10% interest in Defendant. Similarly, although the complaint alleges that Ogulnick terminated Plaintiff's involvement in the Dyer and Jeannette Lane Projects, there is no plausible connection drawn between Defendant's refusal to extend the Outside Date and Ogulnick's decision to terminate Plaintiff from those unrelated projects in which Defendant had no role.

The facts at issue here are easily distinguishable from those in cases where courts have found a duty of care in part because of a close connection between the alleged wrongful conduct and the injury. In *J'Aire,* the conduct in question was failure to timely repair a restaurant's heating and air conditioning, leading to loss of business and economic harm. (*J'Aire, supra*, 24 Cal.3d at pp. 804–805.) In *North American*

Chemical, the defendant's failure to exercise reasonable care in packaging chemicals directly led to the economic harm the plaintiff suffered when its customer received contaminated chemicals. (*North American Chemical, supra*, 59 Cal.App.4th at p. 787.) The connection between Defendant's conduct and the harm to Plaintiff is even more tenuous than in *Lake Almanor*, where the developer alleged a consultant's delay in completing an EIR led to economic losses after an anticipated sale of the property fell apart because the consultant's EIR was not completed on time. (*Lake Almanor, supra*, 178 Cal.App.4th at p. 1198.)

(5) Moral blame attached to Defendant's conduct

Plaintiff contends that Defendant is morally blameworthy for having favored one of its members, Ilus, over the other, Vineyards, when it "wrongfully rejected" Vineyard's option to extend the Outside Date. This allegation is inadequate to support a finding of moral blame. Given the overall structure of the Operating Agreement, the recognition in the complaint that Defendant's alleged failures to perform under the Operating Agreement were in part "because of disagreements between constituent members," and the contentious relationship between Vineyards and Ilus as evidenced by subsequent litigation between the two parties, this factor does not support imposition of a duty owing from Defendant to Plaintiff. The alleged wrongful conduct should be assessed solely under the

duties that Defendant owed to its two constituent members, as set forth by the Operating Agreement. Imposing a separate duty upon Defendant to consider the interests of Plaintiff, a third-party stranger to the Operating Agreement, in resolving disputes between the Defendant's two constituent members would incentivize Defendant to favor one member over the other to avoid its own liability to the third party. (See *Lake Almanor*, *supra*, 178 Cal.App.4th at p. 1206 [finding no duty owing from a consultant preparing an EIR to the developer on the project being studied because exposing the consultant to liability would compromise the independence and objectivity of the consultant].)

(6) The policy of preventing future harm

Plaintiff argues public policy supports imposition of a duty on Defendant because it would ensure that Defendant treated each of its constituent members fairly. As noted above, imposition of a duty on Defendant to consider Plaintiff's interests in its expectations of profits from one of the members, and its expectations of profits in other projects not even connected to Defendant, would have the opposite effect: Defendant would be incentivized to favor one member over another to prevent its own liability toward the third party. Public policy would not be well-served by exposing Defendant to liability to an entity that is not a party to—or intended beneficiary of—an Operating Agreement that specifies how Defendant should treat its constituent

members and under which Defendant has duty to exercise reasonable care toward those members.

Considering all the *Biankanja* factors, we conclude that nothing about the relationship between Plaintiff and Defendant warrants imposing upon Defendant a duty of care owed towards Plaintiff. Accordingly, Plaintiff cannot assert a claim for negligent interference.

Denial of leave to amend

Nowhere in his briefing does Plaintiff argue that its claims can be amended to state a valid cause of action for negligent interference with prospective economic advantage. "It is an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable probability that the defect can be cured by amendment. [Citation.] The burden is on the plaintiff to demonstrate how the complaint can be amended to state a valid cause of action. [Citation.] The plaintiff can make that showing for the first time on appeal. [Citation.]" (*Siliga, supra,* 219 Cal.App.4th at p. 81.) The trial court did not err in denying Plaintiff leave to amend.

DISPOSITION

The judgment is affirmed. Defendant and respondent VDC at the Met, LLC is awarded its costs on appeal.

MOOR, J.

We concur:

BAKER, Acting P.J.

KIM, J.